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No. 82-174

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

H. S. CROCKER COMPANY, INC.
Petitioner,

VS.

FRANK J. OSTROFE,
Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: September 17, 1982

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TABLE OF CONTENTS

	Page
I. The question of employee standing is generating conflicting decisions throughout the country; unless resolved by this court, an employee's right to an antitrust cause of action will be dependent on venue	2
II. Respondent has not rebutted petitioner's presentation of the summary judgment issue	5
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases

	Page
Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982)	2, 3
Blue Shield of Virginia v. McCready, 102 S.Ct. 2540 (1982)	1, 2, 4, 5
Booth v. Radio Shack Division, C.A. No. 813670 (E.D. Pa. 1982)	2
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	4
Callahan v. Scott Paper Co., 541 F.Supp. 550 (E.D. Pa. 1982)	2
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1962)	2, 6
McNulty v. Borden, 542 F.Supp. 655 (E.D. Pa. 1982)	2
Perry v. Hartz Mountain Corp., 537 F.Supp. 1387 (S.D. Ind. 1982)	2
RJM Sales and Marketing, Inc. v. Banfi Products Corp., C.A. 4-81-212 (D.Minn.), argued September 8, 1982	3
Shaw v. Russell Trucking Line, Inc., 542 F.Supp. 776 (W.D. Pa. 1982)	2

Statutes

Clayton Act, § 4 (15 U.S.C. § 15)	passim

Rules

Supreme Court Rules:	
Rule 17.1(a)	3
Rule 28.1	1

Other Authorities

Antitrust and Trade Regulation Report, Volume 43, No. 1073, July 15, 1982	2

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In his response to Crocker's Petition for Writ of Certiorari,[1] respondent urges in summary fashion that certiorari be denied because (1) the facts of this case are "unique", (2) the conflict among circuits over Section 4 standing is a "past conflict" not worthy of resolution in this case, and (3) the inference of conspiracy used by the court of appeals to reverse the district court's grant of summary judgment was properly supported by evidence. In fact, however, (1) this case is *not* unique; there have been at least seven federal court decisions in 1982 *alone* on the question of a discharged employee's standing to sue for *antitrust* damages; (2) there is a square conflict among circuits on the employee standing issue, which was not resolved by this Court's decision in *Blue Shield of Virginia*

[1]Pursuant to Supreme Court Rule 28.1, Petitioner H. S. Crocker Co., Inc. is a California corporation with no parent companies, non-wholly-owned subsidiaries, or affiliates.

v. McCready, 102 S.Ct. 2540 (1982); and (3) the decision below rests on an inference of conspiracy which is contrary to this Court's decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1962), and which, if allowed to stand, could convert every price-fixing case into a case involving a subsidiary conspiracy to boycott allegedly nonsupportive employees.

I. The Question of Employee Standing Is Generating Conflicting Decisions Throughout the Country; Unless Resolved by This Court, an Employee's Right to an Antitrust Cause of Action Will Be Dependent on Venue

There is no basis for respondent's contention that "under the unique facts of this case and the holding below there is no need to resolve any past conflict in the approaches of the courts of appeals to standing to sue under section 4 of the Clayton Act."[2] The issue of employee standing is one of general, and growing, importance under the Clayton Act, Section 4, and the square conflict among the circuits is current and very much alive.[3]

There have been at least seven federal court decisions in 1982 alone involving the question of an employee's standing to maintain an antitrust action challenging an allegedly wrongful termination.[4] In all these cases there were allega-

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[2]Respondent's Brief at 2.

[3]Contrary to respondent's suggestion, the characterization of recent decisions in this area as creating a "growing conflict" is that of the editors of a leading trade periodical, and not merely an allegation of Petitioner. *See* Antitrust and Trade Regulation Report, Volume 43, No. 1073, July 15, 1982.

[4]In addition to this case, those decisions are *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982); *Shaw v. Russell Trucking Line, Inc.*, 542 F.Supp. 776 (W.D. Pa. 1982); *McNulty v. Borden*, 542 F.Supp. 655 (E.D. Pa. 1982); *Callahan v. Scott Paper Co.*, 541 F.Supp. 550 (E.D. Pa. 1982); *Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982); *Booth v. Radio Shack Division*, C.A. No. 813670 (E.D. Pa. 1982).

tions that the defendant employer violated the antitrust laws, that the plaintiff employee refused to participate or threatened to refuse to participate in the alleged antitrust violation, and that the plaintiff employee was fired or forced to resign as a result of alleged non-cooperation.[5] These allegations, which are not unique to the present case, have given rise to different results in different circuits.

In its June 25, 1982 decision in *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982), the Seventh Circuit expressly rejected the holding of the Ninth Circuit below, and recognized that its opinion "creates a conflict between the Seventh and Ninth Circuits."[6] Yet respondent argues that the conflict in decisions is a "past conflict" and one that is not critical. What conflict is more current and critical than one in which one circuit permits claimants a federal remedy, and another three months later denies similarly situated claimants access to that same remedy? Are terminated employees in San Francisco, Los Angeles, Phoenix, Honolulu, and Seattle going to be permitted to seek *federal* antitrust relief, while such employees in Indianapolis, Milwaukee, and Chicago are not? That is the state of the law today, and it begs resolution by this Court.[7] It is the precise situation in which this Court's rules provide that a petition for certiorari should be considered.[8] If left unresolved, the right of an employee plaintiff to seek substantive federal antitrust relief based on an alleged wrongful discharge will inequitably be dependent solely on venue.

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[5]Allegations of this nature are not limited to salaried or commissioned employees. For instance, in *RJM Sales and Marketing, Inc. v. Banfi Products Corp.*, C.A. 4-81-212 (D.Minn.), argued September 8, 1982, the plaintiff is a former *sales agent* seeking federal antitrust relief on his claim of wrongful termination.

[6]681 F.2d at 514.

[7]Crocker expects that by the time this Court considers Crocker's Petition, plaintiff's Petition for Certiorari in *Bichan* will also be before the Court.

[8]Supreme Court Rules, Rule 17.1(a).

Respondent nonetheless urges that certiorari be denied in this case because in his view the court below has clearly followed the principles of standing recently announced by this Court in *Blue Shield of Virginia v. McCready*. Respondent is mistaken. In *McCready*, this court reemphasized that certain injuries are simply "too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under § 4."[9] The question of remoteness depends primarily upon "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4."[10]

As applied in this case, the focus must be on the forms of injury in Congress' mind when it chose to outlaw price-fixing, bid-rigging, and customer allocation conspiracies. The question presented is whether the legal injury allegedly sustained by respondent—discharge from employment—is one of those forms of injury. As pointed out in Crocker's Petition, such injury clearly includes the artificial increase in prices which *customers* must pay due to a non-competitive market, and the loss sustained by non-conspiring *competitors* injured in their ability to compete. Until the decision below, however, no court had ever concluded that *employee discharge* was an injury which Congress sought to remedy when it outlawed price-fixing in the Sherman and Clayton antitrust acts.

As support for his contention that *McCready* disposes of the "remoteness" issue, not only in the consumer standing situation actually presented there, but in employee standing cases as well, respondent points solely to two utterly irrelevant considerations. First, he asserts that his case is like *McCready*, and unlike *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), because his

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[9] 102 S.Ct. at 2547.

[10] *Id.* at 2548.

injury flows from "anticompetitive" behavior.[11] But the fact that the underlying conduct at issue was allegedly anticompetitive begs the essential question of the relationship of the injury alleged to the type of injury Congress was concerned about in passing the antitrust laws. *McCready* clearly did *not* hold that every plaintiff is entitled to antitrust standing merely by alleging an underlying claim of anticompetitive conduct.

Second, respondent contends that congressional concern for employees can be discerned from the imposition of criminal liability on employees who violate the Sherman Act.[12] But there is no rational connection between Congress' choice to impose a criminal penalty on employees acting in violation of the antitrust laws, and the injuries Congress was seeking to prevent when it prohibited price-fixing, bid-rigging, and customer allocation conspiracies.

The court below did *not* correctly apply the principles enunciated in *McCready*, and *McCready* did *not* dispose of the standing issue. Resolution of the circuit court conflict is needed.

II. Respondent Has Not Rebutted Petitioner's Presentation of the Summary Judgment Issue

Respondent argues that the inference of boycott drawn by the Ninth Circuit below to reverse summary judgment in favor of petitioner was proper. He claims that the inference was supported by evidence that while respondent was employed by Crocker, industry personnel and Crocker executives allegedly attempted to coerce him to cooperate with an alleged price-fixing scheme. Respondent's argument misses the point.

On motion for summary judgment, Crocker made an extensive showing based on evidence developed in dis-

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[11] Respondent's Brief at 5-6.

[12] *Id.* at 6.

covery that no boycott existed following respondent's resignation, and that it would not have been futile for respondent to apply for employment. The evidence presented by Crocker was that respondent had been urged to remain with Crocker, that respondent had failed in over seven years to seek any employment in the label industry, that respondent had *admitted* he was not interested in applying for employment in the label business, that industry executives would have considered respondent's application had it been made, and that such executives were not engaged in a boycott of respondent's services. In response, and despite ample opportunity over a number of years to develop support for his allegations, *respondent failed to come forward with any evidence probative of the existence of the alleged boycott* or that it would have been futile for respondent to apply for employment. He filed *no* affidavits in opposition, and simply failed to make the rebuttal showing required by *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1962), to prevent summary judgment.

In his opposition herein, respondent totally ignores *Cities Service*. Given Crocker's extensive showing on its motion for summary judgment, if the inference of boycott applied by the court below is allowed to stand, then indeed, as Crocker asserted in its Petition, any discharged employee will be able to pursue federal antitrust claims by advancing evidence that while employed, his or her employer participated in a price-fixing scheme and allegedly tried to coerce the employee into cooperating. If the employee lacks standing to challenge the alleged price-fixing scheme directly, he should not be allowed by this mechanism—i.e., the allegation of boycott supported by no evidence of boycott—to indirectly challenge that same alleged scheme.

The Ninth Circuit's inference of boycott to reverse summary judgment demands review by this Court.

CONCLUSION

Numerous reasons compel the granting of certiorari in this case. There is need to resolve the conflict among the Circuits on the question of antitrust standing in employee discharge cases, to provide guidance to lower courts and counsel where the line should be drawn in resolving the question of "remote" antitrust injury, and to prevent the unjustified expansion of treble damage litigation (particularly in wrongful discharge cases where state remedies exist) fostered by the antitrust standing and summary judgment rulings of the Ninth Circuit below.

Dated: September 17, 1982.

Respectfully submitted,

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